

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

Aug 4 5 34 PM '92

where it largely duplicates the application process, and instead allow a licensee or permittee to seek such modifications by application alone. Grant of the application would be followed by an amendment to the FM Table of Allotments to reflect the modification.³

MM Docket No. 92-159

DISPATCHED BY

Existing Processes

2. Currently, an FM licensee or permittee seeking an upgrade on an adjacent or co-channel, a modification to an adjacent channel of the same class or a downgrade to an adjacent channel first must file a petition for rule making to amend the FM Table of Allotments.⁴ In each instance, the petition is initially analyzed to determine whether it will meet Commission technical requirements, including minimum distance separation⁵ and city grade coverage.⁶ If this analysis indicates that the proposed channel could be allotted, the Commission issues a *Notice of Proposed Rule Making* ("NPRM") seeking comment on the allotment and designating dates by which comments and reply comments must be filed.⁷ If a modification request requires a change in the frequency of any other authorized station, we issue simultaneously with the *NPRM* an *Order to Show Cause* to the affected licensee or permittee to demonstrate why its frequency should not be changed, as provided by Section 316 of the Communications Act, as amended. If a request requires the change in frequency of an allotted but vacant channel in order to accommodate the proposal, we provide an opportunity for comment on the substitution. During this period, parties may file counterproposals suggesting alternate, mutually exclusive uses of the spectrum in other communities.⁸ If the Commission determines that grant of the proposal is in the public interest, it issues a *Report and Order* modifying the license or permit to specify the new channel, amending the Table of Allotments and requiring the petitioner to file, within ninety days of the effective date of the *Report and Order*, a minor change construction permit application specifying the upgraded channel. The petitioner is also required to file any relevant fees with the minor change application.

In the Matter of

Amendment of the Commission's
Rules To Permit FM Channel and Class
Modifications by Application.

NOTICE OF PROPOSED RULE MAKING

Adopted: July 16, 1992;

Released: August 4, 1992

Comment Date: October 5, 1992

Reply Comment Date: November 4, 1992

By the Commission:

1. We initiate this proceeding on our own motion to propose changes in our rules governing certain modifications of existing FM authorizations. Specifically, we seek comment on whether licensees and permittees should be allowed to request by application upgrades on adjacent and co-channels,¹ modifications to adjacent channels of the same class, and downgrades to adjacent channels.² Licensees and permittees currently must request these changes through a two-step process in which the party first files a petition for rule making and, if the petition is granted, then an application. We propose to streamline this process by eliminating the rulemaking step in circumstances

¹ Adjacent channels include the three channels above and the three channels below the specified channel. A co-channel is the channel occupied under the licensee's or permittee's existing authorization. Pursuant to Section 1.420(g)(3) of the Commission's Rules, for instance, a licensee operating on Channel 250A may seek a channel upgrade on Channels 247, 248, 249, 251, 252, or 253, or on its existing channel.

² Pursuant to Section 73.3573, a licensee or permittee currently may request a co-channel downgrade by application. See *Report and Order*, MM Docket 88-118, 4 FCC Rcd 2413 (1989).

³ Such amendments would be treated as minor and non-controversial as they would simply reflect authorized station operations, and there would thus be good cause for proceeding without notice and comment and for making the rule change effective upon publication in the *Federal Register*. See 5 U.S.C. Section 553 (b)(3)(D).

⁴ Section 1.420 of the Commission's Rules governs procedures in proceedings to amend the FM Table of Allotments. Section 1.420(g), which specifically addresses upgrades, states in pertinent part:

The Commission may modify the license or permit of an FM station to another class of channel... in the course of a rule making to amend Section 73.202(b)... if any of the following conditions are met:

(1) There is no other timely filed expression of interest, or

(2) If another interest in the proposed channel is timely filed an additional equivalent class channel is also allotted, assigned or available for application, or

(3)...[T]he modification of license or permit would occur on a mutually exclusive higher class adjacent or co-channel.

⁵ 47 C.F.R. Section 73.207; See *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990) rev. denied sub nom. *Chester County Broadcasting Co. v. FCC*, Case No. 90-1496, (D.C. Cir. June 6, 1991).

⁶ 47 C.F.R. Section 73.315(a); see, e.g., *Greenwood, South Carolina*, 3 FCC Rcd 4108 (1988), corrected, 3 FCC Rcd 4374 (1988).

At this stage, the Commission also requests concurrence by the Canadian or Mexican governments if required.

⁸ Parties may also express an interest in applying for the channel to which a station proposes to upgrade unless the proposal is for an adjacent or co-channel upgrade. See 47 C.F.R. Section 1.420(g); *Report and Order*, MM Docket 85-313, 60 RR 2d 114 (1986).

3. Once the minor change construction permit application is received, a tenderability review is performed in which the application is examined for completeness. The application is then placed on a *Public Notice of Tenderability/Acceptability*. The application undergoes an engineering analysis to verify compliance with the Commission's Rules regarding minimum distance separation, city grade coverage, and station class requirements with respect to tower height and operating power. The proposed transmitter site is also checked for compliance with requirements regarding environmental concerns, and for requirements regarding tower height and proximity to airports. If the application complies with all relevant requirements, a construction permit is issued.

4. An applicant generally specifies the nature of its technical proposal in greater detail than a rulemaking petitioner.⁹ Normally, however, a licensee or permittee will specify the same site in both the petition for rule making and in the application. In such instances, the engineering analysis for the application is generally duplicative of the analysis performed on the rulemaking petition. In those instances where the applicant specifies a different site than proposed in the rulemaking proceeding, it does so generally because in developing the more comprehensive technical proposal required by an application, it found its earlier proposed site unsuitable. As part of its more detailed showing, an applicant also may employ the contour protection provisions of Section 73.215 of the Rules to propose facilities that would otherwise be short-spaced to existing stations.¹⁰

5. Both the rulemaking and the application stages offer an opportunity for parties to oppose the proposed modification. A party may file an objection or counterproposal during the comment period in response to the *NPRM*, and may also file an informal objection pursuant to Section 73.3587 of the Rules at any time prior to the grant of the implementing application.¹¹

Discussion

6. We propose that licensees and permittees be permitted to request adjacent and co-channel upgrades, same class adjacent channel substitutions, and adjacent channel downgrades in a one-step process through the filing of a minor change construction permit application. We believe that using such a process for each of these classes of actions would serve the public interest by speeding the implementation of service modifications¹² and eliminating redundant staff processing efforts.¹³ With respect to upgrades, these actions generally provide enhanced service to the public. Allowing adjacent channel downgrades may provide some flexibility to utilize allotments that may be unusable due to recently adopted enhanced spacing requirements.¹⁴ Permitting same class adjacent channel substitutions will enable some licensees and permittees to increase power by operating as 6 kW Class A stations. The comprehensive engineering analysis performed with respect to applications in each of these areas subsumes the analysis performed at the rulemaking stage. This unnecessary duplication of effort may impose unnecessary costs on both the stations seeking modifications and the Commission's resources.¹⁵

7. Nonetheless, while we believe that eliminating unnecessary duplication in our processes would serve the public interest, we also believe that it may be desirable to place some limits on the ability to invoke these processes in order to avoid harming core policy objectives. Specifically, we note that there are some types of showings that are considered acceptable in connection with applications, such as contour protection showings pursuant to Section 73.215 of the Rules and showings of "substantial compliance" with our city grade coverage requirements, that we have expressly declined to consider in connection with allotment proceedings.¹⁶ In order to prevent the allotment of channels that would conflict with our present allotment standards, we propose to limit the availability of the new one-step procedure only to those proposals that comply with both our application criteria and our allotment standards. We seek comment on the best means of reaching this objective. One option would be to require that any application filed pursuant to the new procedure meet minimum distance separation and city grade standards as

⁹ However, there are instances in which a rulemaking petitioner may wish to file a detailed engineering showing. See, e.g., *Woodstock and Broadway, Virginia*, 2 FCC Rcd 7064 (1987) (engineering report detailing actual rather than theoretical terrain characteristics accepted in allotment proceeding to demonstrate compliance with city grade coverage requirements).

¹⁰ See *Report and Order, MM Docket 87-121*, 4 FCC Rcd 1681 (1989) (Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas).

¹¹ As a minor change, the application is not subject to the thirty day petition to deny period required by Section 309 of the Communications Act of 1934, 47 U.S.C. Section 309, as amended.

¹² Currently, a typical rulemaking proceeding takes at least six months to complete. Removing the rulemaking stage from the process should reduce the length of time necessary to approve a modification request.

¹³ Under this procedure, any notification to the Canadian or Mexican governments would be made after the application is filed.

¹⁴ See *Memorandum Opinion and Order, MM Docket 88-375*, 6 FCC Rcd 3417 (1991) (amendment of Part 73 of the Rules to

provide for an additional FM station class (Class C3) and to increase the maximum transmitting power for Class A stations), *affirming Third Report and Order, MM Docket 88-375*, 4 FCC Rcd 3557 (1989) (establishing IF separations), *Second Report and Order*, 4 FCC Rcd 6375 (1989) (setting 6 kW limit for Class A FM stations), *First Report and Order, MM Docket 88-375*, 4 FCC Rcd 2792 (1989) (establishing Class C3 FM stations).

¹⁵ In a similar context, we previously decided to allow downgrading of stations by minor change application to avoid unnecessary duplication. See *Report and Order, MM Docket 88-118*, 4 FCC Rcd 2413 (1989).

¹⁶ In adopting rules allowing short spacing through the use of contour protection, we expressly declined to allow contour protection as an allotment tool. See *Report and Order, MM Docket 87-121*, 4 FCC Rcd 1681 (1989). With respect to city grade coverage, compare *Southwest Communications, Inc.*, released July 16, 1986 (letter from Chief, FM Branch) (application standard of 80% coverage considered "substantial compliance" pursuant to city grade coverage requirement of Section 73.315 of the Rules) with *Greenwood, South Carolina*, 3 FCC Rcd 4108 (1988), *corrected*, 3 FCC Rcd 4374 (1988) (allotment standard requires 100% city grade coverage pursuant to Section 73.315 of the Rules).

applied in the allotment context, without making use of less restrictive application standards such as contour protection or substantial compliance, at the site specified in the application. Another option would be to allow an applicant to apply for a station modification at a site that would not meet allotment standards, so long as the applicant can demonstrate that an available site exists which would comply with allotment standards. Our two-step process generally allows such a result. We invite comment on these issues.

8. We also propose to limit this procedure to modifications that require no changes to the Table of Allotments other than a change in the allotment of the station seeking the modification. We believe that the rulemaking process is the most efficient method of soliciting comments in those instances in which a proposal would require changes to the allotments of third party stations, and that such proposals should thus continue to be subject to rulemaking proceedings. Furthermore, we are not proposing that this process should apply to non-adjacent channel upgrades. We believe that the allotment of nonadjacent upgrades must remain within the purview of notice and comment rule making. This is because non-adjacent channel upgrades, pursuant to Section 1.420(g), are subject to competing expressions of interest, although the petitioner may propose the allotment of an additional equivalent channel to the community to accommodate those expressions of interest. Solicitation of such expressions of interest, we believe, is best achieved through a rulemaking proceeding.

9. We also seek comment on several additional issues. In a *Report and Order* adopted simultaneously with this *Notice*, the Commission established rules whereby minor change applications are cut off from the filing of mutually exclusive petitions for rule making as of the day the applications are received at the Commission. See *Report and Order*, MM Docket No. 91-348, FCC No. 92-329, adopted July 16, 1992 ("*Conflicts*"). We propose that the same cut-off rule should apply with respect to any application filed pursuant to this new procedure. We tentatively conclude that the delay to applicants caused by unlimited exposure to potentially conflicting rulemaking petitions would be inequitable and inconsistent with our treatment of other applications pursuant to the new rule adopted today. Establishing cut-off procedures such as these will provide certainty to applicants in terms of exposure to conflicting proposals.¹⁷ Moreover, this proposed approach is consistent with our continuing efforts to encourage FM

licensees to seek to improve service to the public by removing the risk to their existing authorizations where doing so does not unfairly prejudice new applicants.¹⁸

10. We realize that adoption of the cut-off rules established in *Conflicts*, *supra*, will remove the ability of parties to file counterproposals seeking conflicting uses of the spectrum. We tentatively conclude that the *Ashbacker* doctrine¹⁹ does not preclude adoption of the changes contemplated herein. In *Ashbacker*, the United States Supreme Court held that where two *bona fide* applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give it. However, the Court has noted that the Commission can promulgate rules limiting eligibility to apply for a channel when such action promotes the public interest, convenience and necessity.²⁰ As stated in Paragraph 6 *supra*, we believe the changes proposed herein would serve the public interest because enhanced service to the public would be expedited. Furthermore, in *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986), the Court of Appeals noted that *Ashbacker* applies only to parties who are applicants, and not to prospective applicants. A party seeking to amend the FM Table of Allotments is a "prospective applicant" until its application is submitted and accepted pursuant to the Commission's Rules.²¹

11. We recognize that adoption of this proposal may restrict the ability of other parties to file counterproposals seeking competing uses of the spectrum that would be precluded by grant of the application. This proposal, however, is consistent with the approach adopted in *Conflicts*, *supra*. We tentatively conclude that limiting the applicability of the procedure proposed herein only to those modification requests which could meet the requirements of a rulemaking proposal provides other parties with the ability to predict with certainty any preclusive effect that a potential modification may have on FM spectrum availability in the area. The operation of stations on adjacent and co-channels in neighboring communities in conjunction with our minimum distance separation and city grade coverage requirements necessarily limits the maximum power, maximum height and location that a licensee or permittee could request in its application. Therefore, we believe that a prospective petitioner could readily predict whether a particular station potentially could seek a modification by application, thereby enabling the petitioner to file a conflicting request in advance of that application. To the extent that this new procedure may foreclose any potential petitioner's opportunity to request a modification, we be-

¹⁷ We recognize that certain situations may arise in which a pending rule making may conflict with a pending application. In the event an application to upgrade a station is not protected by our cut-off rules from a mutually exclusive petition for rule making, we propose to continue our practice of resolving the conflict between the two proposals in the context of the allotment proceeding in which the rulemaking petition is addressed.

¹⁸ See *Report and Order*, MM Docket 83-1148, 56 RR 2d 1253 (1984) (amendment of the Commission's Rules allowing the upgrade of FM and TV Station licenses where additional equivalent channel available to accommodate competing expressions of interest); *Report and Order*, MM Docket 85-313, 60 RR 2d 114 (1986) (amendment of the Commission's Rules allowing adjacent and co-channel upgrades without entertaining competing expressions of interest); see also *Report and Order*, MM Docket 88-526 (amendment of the Commission's Rules allowing change

of community of license without being subject to competing applications), 4 FCC Rcd 4870 (1989) *recon. denied*, 5 FCC Rcd 7094 (1990).

¹⁹ *Ashbacker v. U.S.*, 326 U.S. 327 (1945).

²⁰ *U.S. v. Storer*, 351 U.S. 192 (1956).

²¹ See also *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1561 (D.C. Cir. 1987) ("only by compliance with such procedures may an application enter the ranks of 'bona fide' applications' protected by *Ashbacker*"). The Commission employed a similar analysis in adopting Section 1.420(i) of its Rules, which permits FM and television licensees and permittees to seek a change in community of license without facing competing applications. See 4 FCC Rcd 4870, 4873 (1989).

lieve that it would be balanced by the certainty and protection from exposure to conflicting requests that the new procedure would provide.

12. We propose that any changes adopted in this proceeding apply only to applications filed after the effective date of the rules. Any rulemaking petitions already filed, or on file on the effective date of the new rules, would be processed under existing procedures. We seek comment on this approach.

Conclusion

13. We believe that the two-step Commission procedure for adjacent and co-channel upgrades, same class channel substitutions and adjacent channel downgrades of FM authorizations can be streamlined by eliminating the rulemaking step in certain situations which require duplicative Commission engineering analyses. This will enhance service to the public by expediting the institution of modifications of service. We seek comment on these proposals generally and on the specific proposed rules intended to implement them. The proposed rules are contained in Appendix A. We also invite comments on alternative proposals.

Procedural Matters

14. *Ex parte rules - non-restricted proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

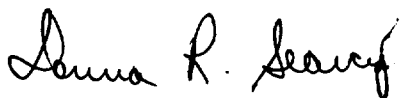
15. *Comment dates.* Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **October 5, 1992**, and reply comments on or before **November 4, 1992**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

16. *Regulatory Flexibility Act.* An initial Regulatory Flexibility Analysis is contained in Appendix B.

17. Authority for this action is contained in 47 U.S.C. Sections 154 and 303.

18. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION



Donna R. Searcy
Secretary

APPENDIX A

It is proposed that Parts 1 and 73 of the Code of Federal Regulations be amended to read as follows:

1. The authority citation for Parts 1 and 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154 and 303.

2. Section 1.420 is amended by adding Note 1 following paragraph (g) and redesignating the Note following paragraph (h) as Note 2 to read as follows:

Section 1.420 Additional procedures in proceedings for amendment of the FM, TV or Air-Ground Table of Allotments.

* * * * *

NOTE 1: In certain situations, a licensee or permittee may seek an adjacent or co-channel upgrade by application. See Section 73.203(b).

* * * * *

1. Section 73.203 is amended by revising paragraph (b) and adding a Note to read as follows:

Section 73.203 Availability of channels.

* * * * *

(b) Applications filed on a first come, first served basis may propose a lower or higher class channel. Applications for the modification of an existing FM broadcast station may propose a lower or higher class adjacent or co-channel, or an equivalent class adjacent channel. In these cases, the applicant need not file a petition for rule making to amend the Table of Allotments (Section 73.202(b)) to specify the modified channel class.

Note: Changes in channel class, and equivalent channel class substitutions by application are limited to first, second and third adjacent and co-channel modifications which meet the minimum spacing requirements of Section 73.207 of the Rules at the site specified in the application, without resort to the provisions of the Commission's Rules permitting short spaced stations as set forth in Sections 73.213-215 of the Rules, and to requests which require no other changes to the FM Table of Allotments or any change in frequency of any other authorized station.

2. Section 73.3573 is amended by revising paragraph (a)(1), adding Note 1 and redesignating Notes 1 and 2 as Notes 2 and 3 accordingly, to read as follows:

Section 73.3573 Processing FM broadcast station applications.

(a) Applications for FM broadcast stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change for FM station authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (73.202(b)). Other requests for change in frequency or community of license for FM stations must first be submitted in the form of a petition for rule making to amend the Table of Allotments. Applications filed

on a first come, first served basis may propose a higher or lower class adjacent or co-channel in an application for a new FM broadcast station. A licensee or permittee may seek the higher or lower class adjacent or co-channel or an equivalent class adjacent channel of its existing FM broadcast station by filing a minor change application. For noncommercial educational FM stations, a major change is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area within the station's predicted 1 mV/m field strength contour. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area). However, the FCC may within 15 days after the acceptance of the application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of Sections 73.3580 and 1.1111 pertaining to major changes.

Note 1: Applications to modify the channel and/or class of an FM broadcast station to an adjacent or co-channel shall not require any other amendments to the Table of Allotments or change in frequency of any other authorized station. Such applications also must meet the minimum spacing requirements of Section 73.207 of the Rules, at the site specified in the application, without resort to the provisions of the Commission's Rules permitting short spaced stations as set forth in Sections 73.213-215 of the Rules.

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APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for the Action:

This review is initiated to consider whether it is advisable to adopt a new procedure by which a licensee or permittee may request a modified channel or class.

II. Objectives of the Action

The objective of this proceeding is to reduce the amount of time necessary for approval of certain modifications and speed the implementation of improved FM service, as well as to reduce the amount of duplication of staff effort in processing such requests.

III. Legal Basis:

Authority for this action may be found in 47 U.S.C. Sections 154 and 303.

IV. Reporting, record keeping, and other compliance requirements:

Such requirements will vary according to the actions that are adopted as a result of the record established in response to this *Notice of Proposed Rule Making*.

V. Federal rules which overlap, duplicate, or conflict with these rules:

There are no rules which would overlap, duplicate, or conflict with these rules.

VI. Description, potential impact and number of small entities involved:

There are a number of radio licensees and permittees who would be affected by this proceeding.

VII. Any significant alternatives minimizing the impact on small entities consistent with stated objectives:

In initiating this change to our modification procedures, the Commission seeks to relieve parties of the burden of filing duplicate requests, reduce the time necessary for approval of a modification and speed the implementation of improved FM service. In this *Notice of Proposed Rule Making*, the Commission invites comments on the alternative methods of applying this new process.